United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7234

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARBARA BOYD, et al., on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

-against-

THE JUSTICES OF SPECIAL TERM PART I, OF THE SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, individually and in their official capacities, et al.,

Defendants-Appellees.

C.A. Docket No. 76-7234

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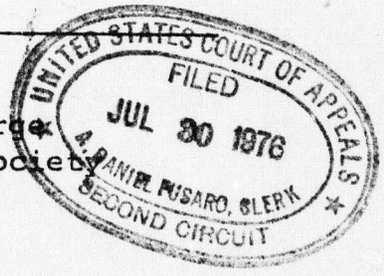
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS



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BRIEF FOR PLAINTIFFS - APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from the order (A-56)[1] of the United States District Court for the Southern District of New York (Duffy, D.J.), dated and entered April 20, 1976, dismissing the plaintiffs' action for lack of a case or controversy.

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1 The references to the Appendix are denominated "A."

Timely notice of appeal (A-57) to this Court was filed by the plaintiffs on May 13, 1976.

ISSUES PRESENTED ON APPEAL

The primary issue presented for review by this Court is whether the District Court erred in dismissing on the hybrid ground of mootness and exhaustion of state remedies this class action brought by thirteen named plaintiffs pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief to secure the constitutional right to assigned counsel for indigent divorce litigants who need but are unable to obtain the assistance of counsel in their divorce proceedings.

Also presented for review are several other issues which were raised and contested by the parties below but were not reached by the District Court in dismissing the plaintiffs' action. These issues are whether a three-judge court is required to determine plaintiffs' substantial constitutional claims, whether this §1983 action is barred by principles of res judicata, whether the defendant state judges can be sued for declaratory and injunctive relief pursuant to 42 U.S.C. §1983, and whether this action is properly maintainable as a class action. Plaintiffs-Appellants (hereinafter "plaintiffs") respectfully request that in reversing the District Court's order of

dismissal for erroneous application of principles of mootness and exhaustion of state remedies this Court should remand the case back to the District Court with directions as to the proper resolution of these other issues.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

By this class action brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3), thirteen indigent divorce litigants, on behalf of themselves and all other similarly situated indigent divorce litigants in Bronx County, seek declaratory and injunctive relief to vindicate their constitutional due process and equal protection rights to the assignment of counsel for all indigent divorce plaintiffs and defendants who need but are unable to secure the assistance of counsel in their divorce proceedings. Upon the filing of their complaint in December 1975 in the United States District Court for the Southern District of New York, the plaintiffs moved for certification of this action as a class action and for the convening of a statutory three-judge court to determine their constitutional claims. The defendants thereupon moved to dismiss the action on various grounds. On April 20, 1976 District Judge Kevin Thomas Duffy dismissed plaintiffs' action on the ground

that the asserted availability of relief for the named plaintiffs under state law created the lack of a case or controversy. This appeal followed.

B. Statement of Facts

The named plaintiffs herein are thirteen indigent residents of Bronx County who instituted this suit after they failed in their efforts to obtain the necessary assistance of counsel in their divorce proceedings. Ten of these persons were prospective divorce plaintiffs who, after their personal efforts to obtain lawyers failed, made unsuccessful pro se applications to the State Supreme Court, Bronx County, for the assignment of counsel in the divorce proceedings which they desired to institute. Two of these persons were prospective divorce plaintiffs who did not seek court-ordered assignment of counsel after failing in their personal efforts to secure lawyers, because sixty-one identical applications for assignment of counsel had just been denied in Bronx Supreme Court. The last of these persons was the defendant in a pending divorce proceeding who, unable to obtain a lawyer, unsuccessfully sought pro se the assignment of counsel from the Bronx Supreme Court.

1. Prospective Divorce Plaintiffs Denied Court-Ordered Assignment of Counsel

The factual allegations of the first ten plaintiffs[2] are fully set forth in the plaintiffs' complaint, paragraphs 16-32, 37 (A-7-20,25) and were substantially made findings of fact by Bronx State Supreme Court Justice Wallace R. Cotton in his decision in Matter of Boyd denying their earlier applications for assignment of counsel (A-30).[3] As alleged in the complaint and as found by Justice Cotton, these ten persons -- nine women and one man -- urgently desired to obtain the legal dissolution of marriages which had become hopelessly unhappy and unworkable due, variously, to the cruelty, abandonment, adultery, and imprisonment of their spouses. The deterioration of their marriages was marked by serious impair-

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[2] Barbara Boyd, Noemi Torres, Carmen Vigo, Helen Johnson, Carmen Castaneda, Awilda Cedeno, Rosa Agosto, Mariam Johnson, Francisco Seda, and Gloria Simons.

[3] The factual allegations of all the plaintiffs herein are necessarily taken as true on the defendants' motion to dismiss and on review of the District Court's dismissal of this action. Hospital Building Company v. Trustees of the Rex Hospital, 44 U.S.L.W. 4683 (May 24, 1976); Haines v. Kerner, 404 U.S. 519 (1972); Gardner v. Toilet Goods Ass'n., 387 U.S. 167, 172 (1967); Build of Buffalo, Inc. v. Sedita, 441 F. 2d 284, 287 (2 Cir., 1971); Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2 Cir., 1970); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2 Cir., 1968).

ment of their physical and mental well-being and by lack of financial support from their spouses for themselves and their children. Complaint, paragraphs 23a-32 (A-12-21). Although urgently needing and desiring a divorce, none of these ten persons was realistically able to institute and prosecute her/his divorce action without the assistance of counsel. However, their individual efforts to obtain counsel were wholly without success, and they finally turned to the Bronx Supreme Court seeking court-assigned counsel.

In passing on the pro se applications of these and fifty-one other prospective divorce plaintiffs for the assignment of counsel, Justice Cotton found that each of the applicants was indigent and unable to pay the costs, fees and expenses required to intitiate the proposed divorce action and to retain counsel therein. Cotton opinion, page 3 (A-32). Justice Cotton stated that "[o]n their face, the applications demonstrate both jurisdiction and legal grounds to institute actions for divorce." Cotton opinion, page 3 (A-32). The Judge also concluded that "[u]nquestionably, the assistance of counsel is necessary for these prospective matrimonial litigants":

> In divorce actions parties are almost invariably represented by counsel, and with good reason. The procedural steps

> necessary to prosecute a matrimonial action -- even an undefended one -- are numerous and omplex; formal rules of evidence are in force at trial; litigants may lose important substantive and procedural rights if not timely and effectively raised; and proof requirements are more stringent than in other kinds of civil proceedings. According to the affidavits of the 61 applicants, none has legal training or experience, and it is safe to conclude that not one of them is knowledgeable of the procedures necessary to follow in the prosecution of a divorce action. In any event none would be able to handle those procedures pro se if called upon to do so. The preparation, serving and filing of the necessary papers alone is surely beyond their grasp-- those papers include the summons, complaint; reply to counterclaim (if any); demand for bill of particulars (if appropriate); pre-trial motions, as for temporary alimony or child support; note of issue; affidavit of regularity; certificate of dissolution; and findings of fact, conclusions of law, and proposed judgment.
> Cotton opinion, pages 4-5 (A-33-34).

See complaint, paragraph 23. (A-10)

Justice Cotton concluded that questions regarding child custody and child support were likely to arise in the divorce proceedings of the ten persons, each of whom has minor children of the marriage, and that "assistance of counsel is particularly important" in settlement negotiations regarding these matters. Cotton opinion, page 5 (A-34). Two of these ten plaintiffs[4] are unable to speak or write

4 Awilda Cedeno, Rosa Agosto.

the English language, a circumstance which Justice Cotton found "makes the need for counsel even more compelling" since "[f]or these prospective litigants, the prospect of attempting to proceed without counsel, to prepare and file papers in the English language, as required by CPLR 2102(b), is effectively foreclosed." Cotton opinion, page 6 (A-35).

Finally, Justice Cotton found that "[t]he record establishes that each of these matrimonial litigants has been wholly unsuccessful in obtaining counsel by his or her own devices, notwithstanding substantial and diligent efforts to that end." Cotton opinion, page 6 (A-35).

> Each has requested to be referred to a private attorney by the legal referral services of the Bronx County Bar Association and the New York County Bar Association. They were informed by both referral services that no referral could be made because they cannot afford to pay a fee.
>
> Next, the petitioners turned to the federally funded legal services offices in Bronx County which render free assistance to individuals who are unable to retain private counsel. They requested the assistance of South Bronx Legal Services at 579 Courtlandt Avenue, and Morrisania Legal Services at 1438 Boston Road, in the Bronx. Both services told the applicants they do not handle divorce cases.
>
> Finally, the petitioners sought the assistance of The Legal Aid Society, at 1029 East 163rd Street, Bronx. This office does accept cases of the type presented here; indeed it maintains a substantial docket of matrimonial matters

> in this Court totalling hundreds of cases each year. It is apparently the only facility in Bronx County presently rendering free legal assistance in divorce matters. Each of the applicants was informed at this office that while he or she is financially eligible for the services of this office, it is unable to accept the case because of its large existing caseload, and its lack of resources and manpower to accept additional cases.
>
> Cotton opinion, pages 6-7, (A-36).

Notwithstanding his conclusion that each of these ten persons and the fifty-one other applicants before him needed the assistance of counsel in their proposed divorce actions and could obtain that assistance only through court assignment, Justice Cotton declined to grant the applications:

> The Attorney-in-Charge of the Legal Aid Society's Bronx office has submitted an affirmation with each of the applications, which further details the inability of the office to accept the cases at bar. With a current active docket in excess of 300 matrimonial matters, the office has a waiting list of over 600 other individuals who have been given appointments, at the rate of 20 per week, through the month of February, 1976. In addition, the 10-attorney office handles a large volume of other civil matters such as housing and welfare problems, social security cases, employment matters and consumer cases. The affirmation concludes with an unequivocal statement of inability to accept the cases, consistent with the disciplinary rules of the Canons of Professional Responsibility that forbids the acceptance of a case to which an attorney cannot devote full attention, and that requires full preparation to be given to those cases for which responsibility has been undertaken (DR 6-101). Under these

circumstances, it would be an improvident exercise of discretion to impose an involuntary assignment of these cases upon the Society (Vanderpool v. Vanderpool, 40 AD 2d 1020 [2nd Dept. 1972]; Cerami v. Cerami, 44 AD 2d 890 [4th Dept. 1974]).

Further, it is not a realistic option to compel members of the private bar of this County to accept assignment of these cases. If it were a matter of one or two applications, the Court would have no hesitancy in doing so; but in the absence of statutorily authorized compensation for the services of private attorneys (see Matter of Smiley, supra, 36 N.Y. 2d 433, 438), it would impose an intolerable burden on the Bronx matrimonial bar to assign such cases in the volume presented here. Alternatively, to assign some of the cases and not others would be manifestly unfair, since all appear on their face to be equally meritorious. Moreover, the Court has been advised by the Legal Aid Society that many more hundreds of Bronx residents in addition to the 61 individuals at bar would presently qualify for the same relief sought by these applicants, and these other individuals would undoubtedly meet with the same dilemma of being unable to obtain the assistance of counsel. The situation is an unfortunate reflection of the chronically inadequate legal services resources available to the indigent population of the Bronx.

Article II of the CPLR, as construed by the Court of Appeals in Matter of Smiley, supra, affords no absolute right to assignment of counsel in a poor person application. It does give the court broad discretionary power to assign counsel on an uncompensated basis in appropriate circumstances. As detailed above, each of these litigants has demonstrated a need for counsel, which he or she will be unable to secure without the Court's assistance. Unfortunately, the reality is that in the absence of public compensation for the assistance of attorneys in such cases, the resources of legal aid services and the private bar are presently inadequate to deal with the problem. The Court is

> therefore reluctantly constrained to deny that part of the applications that seeks assignment of counsel.
>
> Cotton opinion, pages 7-9 (A-36-8).

Justice Cotton expressly recognized the serious hardships and grave practical problems which these indigent prospective divorce plaintiffs would be left to face as a result of his ruling:

> In denying the requested assignment, the Court is fully aware of the serious consequences that may result from delay in the prosecution of the intended actions. With the passage of time facts become more difficult of proof, witnesses become unavailable, and statutes of limitation run.*

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*A five-year statute of limitations applies to causes of action for cruelty, imprisonment and adultery, asserted by 27 of these applicants. (D.R.L. §210[a]).

> Moreover, as long as these prospective litigants are without counsel, and consequently foreclosed from the exclusive remedy available to them, it will be difficult or impossible for them to settle and stabilize their fundamental family relationships, make fresh starts and seek new directions in their lives. The cost, in both personal and social terms, is substantial. Among the 39 women in this group of applicants who subsist on public welfare benefits, for example, there are perhaps some for whom a delay in the dissolution of an already dead marriage prevents them from entering into a remarriage that may offer an opportunity to break out of the cycle of welfare dependency.
>
> Cotton opinion, pages 9-10 (A-38-9).

Justice Cotton concluded by noting that the applicants had not asserted before him any claim of a constitutional right to the assignment of counsel, but that in any event such constitutional claim necessarily would be foreclosed by the binding decision of the New York Court of Appeals in Matter of Smiley, 36 N.Y. 2d 433 (1975). Cotton opinion, page 10 (A-39).

2. Prospective Divorce Plaintiffs Not Specifically Denied Court-Ordered Assignment of Counsel

The circumstances of the next two plaintiffs herein[5] parallel precisely those of the prior ten, except that these two prospective divorce plaintiffs did not seek court-ordered assignment of counsel from the Bronx Supreme Court in light of the denial of sixty-one prior applications for the same relief. These two persons have both jurisdiction and legal grounds to institute divorce actions in Bronx Supreme Court, based, respectively, upon cruelty and abandonment and upon abandonment. Each has a minor child or children of the marriage and neither is receiving from her husband any financial support for herself or her child or children. Neither has

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5 Stella Palmer, Valeria Harding. See, Complaint, paragraphs 16-19, 21, 23, 33-34, 36-37, (A-7-8,10-12,21-3,24-6)

the legal training and experience to enable her to deal pro se with the procedures and issues of her divorce actions. Like the ten other plaintiffs and for the same reasons, these two persons were turned down by the legal referral services of both the Bronx and New York City Bar Associations and could not be represented by any of the several federally funded legal services offices in the Bronx. The Bronx office of The Legal Aid Society, the only legal services office in the Bronx which handles divorce cases, was unable to represent these financially-eligible persons because of excessive case-load and limited resources. The identical applications of sixty-one other indigent prospective divorce plaintiffs having just been denied by Justice Cotton, these two persons did not seek assignment of counsel from the Bronx Supreme Court.

3. Divorce Defendant

The thirteenth and final named plaintiff in this suit, Carlota Barrera, was a defendant in a divorce action pending in the Bronx Supreme Court. Like the other named plaintiffs herein, Mrs. Barrera is totally untrained in the law and further is unable to speak or write the English language and had been subjected to attempts by her husband's divorce lawyer to persuade her to sign papers without the advice of her own counsel. Mrs. Barrera required the assistance of counsel to enable her to handle the necessary procedures

in the divorce proceeding, to effectively assert her defense to the action based upon her husband's abandonment, and to seek alimony for herself and child support for the two minor children of the marriage. Lacking funds to retain a lawyer, Mrs. Barrera, like the other named plaintiffs herein, had been unsuccessful in her efforts to secure counsel through the legal referral services of the Bronx and New York City Bar Associations and from the legal services offices in the Bronx. Again, the Bronx Office of The Legal Aid Society was unable to represent her because of its heavy caseload. Mrs. Barrera's application to the Bronx Supreme Court for the assignment of counsel was summarily denied by Justice Callahan. (A-40).

4. Proceedings in the District Court

Urgently needing but unable to obtain the assistance of counsel in their divorce proceedings, these thirteen indigent Bronx matrimonial litigants thereupon filed this class action suit pursuant to 42 U.S.C. §1983 and 28 U.S.C.§1343(3) in the United States District Court for the Southern District of New York in December 1975. The plaintiffs sued on behalf of a class of all indigent divorce plaintiffs and defendants in Bronx County who need but are unable to obtain counsel to represent them in their divorce proceedings. Sued individually and in their official capacities as defendants in this action

were all the Justices, including Justices Cotton and Callahan, who sit in Special Term, Part I, of the Bronx Supreme Court and thereby determine applications for the assignment of counsel for Bronx divorce litigants; four state judges who have administrative power and responsibility over the aforesaid Justices; and Hugh L. Carey, who as Governor of the State of New York is obligated by the New York State Constitution to see that all state laws are faithfully executed. The plaintiffs sought declaratory and injunctive relief securing the constitutional rights of plaintiffs and plaintiff class memebers under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the assignment of counsel in divorce proceedings, and invalidating New York Civil Practice Law and Rules (CPLR) 1102(a) insofar as that provision denies their constitutional rights to assigned counsel.

Upon the filing of their complaint the plaintiffs moved for certification of this action as a class action and for the convening of a statutory three-judge court to hear and determine their constitutional claims. Submitted in support of plaintiffs' motion for class certification were an affidavit of Michael D. Hampden, the Attorney-in-Charge of the Bronx Neighborhood Office of The Legal Aid Society, (A-42), and the affidavits which had been filed in Bronx Supreme Court by thirty-five of the indigent

prospective divorce plaintiffs whose applications for assignment of counsel, along with those of the first ten named plaintiffs in this action, were denied by Justice Cotton prior to the filing of this action. (A-30). The thirty-five affidavits set forth the facts upon the basis of which Justice Cotton found that, like the first ten named plaintiffs herein, these thirty-five prospective divorce plaintiffs are indigent, have both jurisdiction and legal grounds to institute divorce actions, need the assistance of counsel in order to effectively institute and prosecute their proposed divorce actions, and were wholly unsuccessful in obtaining counsel through their own diligent efforts. Cotton opinion (A-30 et seq.).

The affidavit of Michael D. Hampden was submitted specifically in support of plaintiffs' contention that their class is so numerous that joinder of all members is impracticable (Rule 23(a)(1) of the Federal Rules of Civil Procedure). In his affidavit Mr. Hampden explained that his office is the only legal services facility in the Bronx which renders legal assistance in matrimonial cases. Mr. Hampden further stated that his office opens intake for matrimonial cases for only a single week over a period of almost a year, during which time approximately 600 indigent Bronx residents are given appointments to be

interviewed and represented in their divorce actions. Because the demand by indigent Bronx residents for representation in their divorce cases vastly exceeds the representational capacity of this legal services office, approximately 8750 to 10,000 indigent persons, in Mr. Hampden's estimation, annually must be denied representation by his office in their divorce cases.

In response to plaintiffs' motions, the defendants moved for dismissal of this action pursuant to F.R.C.P. 12(b) on a variety of grounds, including the asserted requirement of exhaustion of state judicial remedies, the applicability of principles of res judicata, the alleged immunity of state judges from declaratory and injunctive relief in a §1983 action, the insubstantiality of plaintiffs' constitutional claims, and the inappropriateness of class certification.

During the pendency of the plaintiffs' and defendants' motions before the District Court, Mrs. Barrera's husband moved to calendar his divorce action against her for trial in Bronx Supreme Court. A private attorney who had volunteered his services in the wake of the publicity generated by Justice Cotton's decision in Matter of Boyd (New York Law Journal, November 6, 1975, p.1, col.2, and p.10, col.2) agreed to provide uncompensated representation for Mrs.

Barrera, who speaks and writes only Spanish and urgently needed the assistance of counsel at trial.

Following lengthy and comprehensive briefing of all the issues raised by both parties, Judge Duffy issued on April 20, 1976 a brief two-paragraph decision in which he concluded as follows:

> The Attorney General has informed me that New York State law already provides for the relief which the plaintiffs seek. It would appear therefore that there is not a case or controversy and, accordingly, the matter is dismissed. (A-56)

On May 13, 1976 the plaintiffs filed a timely notice of appeal to this Court from the order and judgment of the District Court dismissing this action.

Since the decision of the District Court, the Bronx Office of The Legal Aid Society has undertaken to represent divorce plaintiffs in their divorce actions each of the prospective/who were named plaintiffs in this action or whose affidavits were submitted to the District Court in support of plaintiffs' motions there. Representation of these persons will occur in the normal course of the first-come, first-served procedure described by Michael Hampden in his affidavit (A- 42) as the basis for the handling of the vast numbers of eligible persons who come to his office for representation in matrimonial matters. The current appointment list of indigent clients with matrimonial cases extends until late April of

1977, and the Bronx Office will not open again for intake of matrimonial matters until that time. Meanwhile, since the close of matrimonial intake in late March 1976, the Bronx Office has been compelled to turn away weekly approximately 100 to 125 financially eligible persons who seek legal representation in divorce actions. Thus, an estimated 5000 to 6000 such persons will have to be sent away until the Bronx Office opens again for matrimonial intake next year, when the cycle of rejections will begin again.

SUMMARY OF ARGUMENT

The District Court's dismissal of this action on the hybrid ground of mootness and required exhaustion of state judicial remedies was clearly erroneous. Both at the time of the institution of the suit and, with a single exception, at the time of the action's dismissal, the named plaintiffs had a specific live controversy with the defendants with respect to the constitutional claims asserted herein. The doctrine of the exhaustion of state judicial remedies has no application to an action brought pursuant to 42 U.S.C. §1983, and especially to this one since state appellate remedies were unavailable in any event. Therefore, this Court should reverse the order of dismissal of the District Court.

Upon reversal, this Court should remand this case back to the District Court with specific directions as to the resolution of other issues contested below but not reached by the District Court. Thus, this Court should make it clear that plaintiffs herein have a federal constitutional right to assigned counsel in their divorce proceedings, and that a three-judge court must be convened to determine those claims. This Court should also hold that principles of res judicata impose no bar to the institution of this §1983 action, and that the de-

fendant state judges are properly suable here for declaratory and injunctive relief pursuant to 42 U.S.C. §1983. Finally, this Court should direct the District Court to certify this action as properly maintainable as a class action on behalf of all Bronx County indigentdivorce litigants who are unable to obtain the necessary assistance of counsel in their divorce proceedings.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DISMISSING THIS ACTION FOR PURPORTED MOOTNESS.

Judge Duffy concluded that this action was moot because he had been "informed" by defendants' counsel that "New York State law already provides for the relief which the plaintiffs seek." In following this most peculiar and perplexing analytical route, Judge Duffy apparently thought that a purported requirement of exhaustion of state judicial remedies somehow automatically renders a federal action moot. However, a doctrine of the exhaustion of state judicial remedies, which in any event has no application to federal actions brought pursuant to 42 U.S.C. §1983,[6] has no relevance to mootness, and this action was not moot either at the time it was instituted or at the time it was dismissed.

At the time of the filing of the complaint herein, there existed a "specific live grievance" and a "substantial controversy" (Golden v. Zwickler, 395 U.S. 103, 108, 110 (1969)),

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[6] See POINT II, infra.

between each of the thirteen named plaintiffs herein and the defendant state judges and state Governor, with respect to the claimed constitutional right to the assignment of counsel in her/his divorce proceeding and the claimed unconsitutionality of CPLR 1102(a) insofar as it denies that right. Each of the first ten named plaintiffs had specifically been denied the right to assigned counsel by Justice Cotton, one of the defendant Justices of Special Term, Part I, of the Bronx State Supreme Court, on the ground that CPLR 1102(a), as authoritatively construed by the New York Court of Appeals in Matter of Smiley, 36 N.Y. 2d 433 (1975), does not require such assignment. Plainly, therefore, each of these plaintiffs suffered actual injury at the hands of a defendant state judge [7] and through the application of the challenged state statute. Each of the next two named plaintiffs had suffered a genuine and immediate threat of injury from a defendant state judge sufficient to satisfy Article III case or controversy requirements. Steffel v. Thompson, 415 U.S.

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[7] As demonstrated in POINT V, infra, the defendant state judges are properly suable for declaratory and injunctive relief pursuant to 42 U.S.C. §1983.

452, 459 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); 414 Theater Corp. v. Murphy, 499 F. 2d 1155, 1158 n.3 (2 Cir., 1974); Aquayo v. Richardson, 473 F.2d 1090, 1099 (2 Cir. 1973), cert. den., 414 U.S. 1146 (1974); Thoms v. Heffernan, 473 F. 2d 478, 484-85 (2 Cir., 1973); Cobb v. Beame, 402 F. Supp. 19 (S.D.N.Y., 1975); Population Services International v. Wilson, 398 F.Supp. 321, 339-40 (S.D.N.Y., 1975). It was obvious that both of them would have been denied assignment of counsel by a defendant Justice of Special Term, Part I, had they sought that relief following Justice Cotton's denial of sixty-one identical such applications, and that any constitutional claim of right to assigned counsel would have been summarily rejected in light of Matter of Smiley, supra. The last named plaintiff had been denied assignment of counsel by Justice Callahan, another of the defendant Justices of Special Term, Part I, in the divorce proceeding in which she was a defendant. Each of these thirteen named plaintiffs also had a substantial controversy with Governor Hugh Carey, since by virtue of his state constitutional obligation to "take care that the laws are faithfully executed" (New York Constitution, Art. IV, §3), he has "some connection" with the enforcement of the challenged statute, CPLR 1102(a). Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 988 n.7 (S.D.N.Y., 1970), aff'd 400 U.S. 806 (1970); Johnson v. Rockefeller,

58 F.R.D. 42 (S.D.N.Y., 1973), three-judge court, 365 F.Supp. 377 (S.D.N.Y., 1973), aff'd 415 U.S. 953 (1974); Board of Elections v. Lomenzo, 365 F.Supp. 50, 53 (S.D.N.Y., 1973); Federal National Mortgage Ass'n. v. Lefkowitz, 383 F.Supp. 1294, 1298 (S.D.N.Y., 1974).

With a single exception the circumstances, and the specific live controversies, of each of the named plaintiffs remained unchanged at the time of the District Court's dismissal of this action. During the pendency of plaintiffs' motions, the husband of Mrs. Barrera, the divorce defendant, moved to calendar his divorce action against her for trial. Mrs. Barrera speaks and writes only Spanish and would have been at a serious disadvantage had she attempted pro se to defend at trial the divorce action of her husband, who was represented by counsel. Under these circumstances, a private attorney, who had volunteered his services in the wake of the publicity generated by Justice Cotton's decision in Matter of Boyd, agreed to represent Mrs. Barrera without compensation. At the time of the dismissal of this action the other named plaintiffs remained unable to obtain the assistance of counsel in their proposed divorce actions. Since the cases and controversies of all but one of the named plaintiffs were still alive at the time of the District Court's decision, Judge Duffy clearly erred in dismissing

this action for mootness.

Subsequent to the District Court's dismissal, the Bronx Office of The Legal Aid Society undertook, by way of the regular operation of its first-come, first served basis for handling matrimonial cases, to represent the remaining twelve named plaintiffs in their divorce actions. Such a development might ordinarily create mootness problems. However, this action was properly brought as a class action on behalf of all indigent Bronx divorce litigants who need but are unable to obtain the assistance of counsel, and should have been certified as such by the District Court,[8] thereby giving the class of unnamed persons a legal status separate from the named plaintiffs' interests. Sosna v. Iowa, 419 U.S. 393, 399 (1975). On remand the District Court should certify the class and the class certification should relate back to the filing of the complaint, or at least back to the time of that Court's erroneous dismissal of the action and its failure to pass on plaintiffs' class certification motion.[9] Franks v. Bowman Transportation Co.,

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[8] See POINT VI, infra.

[9] Rule 23(c)(1) requires that the District Court determine the issue of class action certification "[a]s soon as practicable after the commencement of an action brought as a class action," and prior to and without regard to its decision on the merits. Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10 Cir., 1975); Jiminez v. Weinberger, 523 F.2d 689, 697 (7 Cir., 1975), cert. den. sub nom. Mathews v. Jiminez, 44 U.S.L.W. 3754 (1976).

__U.S.___ , 47 L.Ed.2d 444, 455-57 (1976); Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54, 63 n.11 (1975); Sosna v. Iowa, 419 U.S. 393, 398-403 (1975); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9 Cir., 1975); Jiminez v. Weinberger, 523 F.2d 689 (7 Cir., 1975), cert. den. sub nom. Mathews v. Jiminez, 44 U.S.L.W. 3754 (1976); Jones v. Diamond, 519 F.2d 1090, 1093 n.1 (5 Cir., 1975); Frost v. Weinberger, 515 F.2d 57, 62-65 (2 Cir., 1975); Tedeschi v. Blackwood, 410 F.Supp. 34, 38-41, (D. Conn, 1976)(three-judge court); Woe v. Mathews, 408 F.Supp. 419, 429 (E.D.N.Y., 1976); De Lao v. Weinberger, 400 F.Supp. 1043, 1044 (D. Ariz., 1975); Lugo v. Dumpson, 390 F. Supp. 379, 381-82 (S.D.N.Y., 1975); Plato v. Roudebush, 397 F.Supp. 1295, 1299-1300 n.3 (D. Md., 1975).

Because of the circumstances of this case, the issue sought to be litigated here will recur yet tend to escape full review at the behest of any single challenger.[10] The pressing need of any named prospective divorce plaintiff for a divorce, as well as for resolution of any of the crucial issues of

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10 However, the Supreme Court has recently indicated that even the "capable of repetition, yet evading review" dimension of a case is not crucial in determining whether a class action is moot. Franks v. Bowman Transporation Co., ___U.S.___, 47 L.Ed.2d 444, 455-57 (1976).

child custody or visitation, an order of protection from a spouse's physical abuse, child support, or alimony, may compel her/him to initiate and prosecute the divorce action without the assistance of counsel. Any named divorce defendant is subjected to even greater compulsion to litigate the divorce action without the assistance of counsel, since she/he has little control over the progress of the proceedings. Finally, although any indigent person who is a named plaintiff in this action will have been initially turned down in her/his request for representation by the Bronx Office of The Legal Aid Society, she/he will eventually have the opportunity to reapply to that office during its next matrimonial intake period, approximately one year later. That person will thus have a chance to be placed on a waiting list and eventually, after the inevitable passage of a substantial period of time, receive representation by The Legal Aid Society in her/his divorce proceeding.

Finally, from among the thousands of indigent Bronx County residents who, since the closing of matrimonial intake last March, have been and will be necessarily refused representation by the Bronx Office of The Legal Aid Society in their divorce actions, there are many members of plaintifss' class who are prepared to intervene in this action upon its remand back to the District Court. Cf. Hagans v. Wyman, 527 F.2d 1151, 1153

(2 Cir., 1975); Norman v. Connecticut State Board of Parole, 458 F.2d 497, 499 (2 Cir., 1972).

POINT II

THE DISTRICT COURT ERRED IN SUGGESTING THAT THE PLAINTIFFS IN THIS §1983 ACTION MUST EXHAUST STATE JUDICIAL REMEDIES.

Although the District Court dismissed this action on grounds of mootness, the decision appeared to rest upon a rationale that the plaintiffs were required to press any state law claims they might arguably have through the state court system prior to instituting this federal action pursuant to 42 U.S.C. §1983. That rationale is plainly without substance. The Supreme Court and this Court have repeatedly and unequivocally held that it is no prerequisite to the institution of a §1983 action in federal court that the federal plaintiffs first exhaust even clearly available state court remedies, notwithstanding that they might thereby prevail in state court on state law or federal constitutional[11]

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[11] As Justice Cotton observed in Matter of Boyd it would have been a futile gesture for the plaintiffs to press their federal constitutional claims in state court, since those claims have been foreclosed there by the binding decision of the New York Court of Appeals in Matter of Smiley, 36 N.Y.2d 433 (1975).

grounds and thus avoid the need for the federal suit. Ellis v. Dyson, 421 U.S. 426, 432-33 (1975); Allee v. Medrano, 416 U.S. 802, 814 (1975); Steffel v. Thompson, 415 U.S. 452, 473 (1974); Preiser v. Rodriguez, 411 U.S. 475, 498-9 (1971); Lake Carriers' Asso. v. MacMullan, 406 U.S. 498, 510 (1972); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961); McRedmond v. Wilson, 533 F.2d 757, 760-62 (2 Cir., 1976); Morgan v. LaVallee, 526 F.2d 221, 223 (2 Cir., 1975); Cordova v. Reed, 521 F. 2d 621, 624 (2 Cir., 1975); Friedlander v. Cimino, 520 F.2d 318, 319 (2 Cir., 1975); Johnson v. Glick, 481 F.2d 1028, 1030 n.1 (2 Cir., 1973); Russo v. Central Sch. Dist. No. 1, 469 F.2d 623, 628 n.5 (2 Cir., 1972); James v. Board of Education of Central Dist. No. 1, 461 F.2d 566, 570 (2 Cir., 1972), cert. denied, 409 U.S. 1042 (1973); Corby v. Conboy, 457 F.2d 251, 253 (2 Cir., 1973); Sostre v. McGinnis, 442 F.2d 178, 182 (2 Cir., 1971) (en banc), cert. denied, 404 U.S. 1049 (1972).

Further, the ten named plaintiffs who were denied assignment of counsel by Justice Cotton not only were not required but as well were unable to exhaust state appellate remedies. The motions to Justice Cotton for assignment of counsel were made ex parte, and it is well-settled that no appeal lies from the New York State Supreme Court to the Appellate Division from an order which determines such an

ex parte motion. CPLR §5701(a)(2); Matter of the Dissolution of 350 W. 46th St., Inc. v. Marbo, 20 A.D.2d 685 (1st Dept., 1964); 1 Weinstein-Korn-Miller, New York Civil Practice, §5701.07.[12] The motions to Justice Cotton were made ex parte because they sought to obtain assignment of counsel in advance of commencing the divorce actions, at a time when there were no proper parties on which to serve the motion papers. The New York City Finance Administrator, who must by statute be served with any poor person motion made after the commencement of an action (CPLR §1101(c)), would not have been a proper party to these motions since no request was made for expenditure of public funds for assigned counsel, that issue having been foreclosed along with the constitutional issue by the New York Court of Appeals' decision in Matter of Smiley, 36 N.Y.2d 433 (1975).

Thus, no doctrine of the exhaustion of state judicial remedies has any application to this action.

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[12] Weinstein-Korn-Miller, supra, §5702.27, notes that the appealability of such an order even by permission is doubtful.

POINT III

PLAINTIFF INDIGENT DIVORCE LITIGANTS HAVE A CONSTITUTIONAL RIGHT TO THE ASSIGNMENT OF COUNSEL IN THEIR DIVORCE PROCEEDINGS, WHICH CLAIM MUST BE DETERMINED BY A THREE-JUDGE COURT.

The constitutional guarantee of assigned counsel for an indigent divorce litigant who needs but is unable to obtain a lawyer flows inevitably from the underlying premise of Boddie v. Connecticut, 401 U.S. 371 (1971), that the State must guarantee each divorce litigant a meaningful opportunity to be heard on her/his claimed right to the dissolution or preservation of the marriage relationship.

In Boddie the Court had before it only the question of the constitutionality of filing and service fees as a barrier to a meaningful opportunity for an indigent divorce litigant to be heard in the divorce proceeding. However, in view of the analytical underpinning of the Boddie holding that the State must remove a barrier to a meaningful opportunity to be heard which takes the form of fees and costs, there is little doubt that the Court would, in a case squarely presenting the question, equally require the State to remove the barrier to a divorce litigant's meaningful opportunity to be heard which assumes the form of the litigant's inability to obtain the necessary assistance of

counsel.[13]

The Boddie Court specifically premised its decision on the application to the unique context of divorce proceedings of two firmly established due process principles. First, due process requires that all persons "forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." (401 U.S. at 377-79). Second, due process secures for every individual an opportunity to be heard which is meaningful in light of that individual's particular circumstances. (401 U.S. at 379-80). The Court then concluded that as applied to the unusual setting of divorce proceedings these two fundamental due process principles generally require the State to assure all divorce litigants a meaningful opportunity "to be heard upon their claimed right to a dissolution of their marriages." (401 U.S. at 380).

Two distinctive characteristics of divorce proceedings persuaded the Court to impose this unique obligation upon the State to guarantee every divorce litigant a full and meaningful

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[13] The Supreme Court has explicity rejected a "'civil' label-of-convenience" rationale as a basis for limiting the historically evolving constitutional right to counsel. In re Gault, 387 U.S.1, 34-42, 49-50 (1967). Recent decisions in this jurisdiction have recognized a constitutional right to counsel in purely civil proceedings involving private parties. Vail v. Quinlan, 406 F.Supp. 951 (S.D.N.Y., 1976)(three-judge court)(debtor contempt proceedings); Abbit v. Bernier, 387 F.Supp. 57, 62 n.12 (D. Conn., 1974) (three-judge court)(debtor body execution proceedings).

The Supreme Court has also clearly recognized the appropriateness of Federal Court intervention, on constitutional grounds, in

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chance to participate in this particular judicial proceeding. First, the establishment and dissolution of the marriage relationship involve liberty and associational interests which are of fundamental importance under our Constitution. Boddie, 401 U.S. at 376, 383; accord, United States v. Kras, 409 U.S. 434, 441-46 (1973); Ortwein v. Schwab, 410 U.S. 656, 658-59 (1973). In addition, though not specifically mentioned in Boddie, other constitutionally protected interests also are directly implicated whenever divorce actions involve litigation or settlement negotiations concerning the parents' respective rights to the custody or visitation of a child, since each parent has a fundamental constitutional right to the "companionship, care, custody, and management" of his or her child. Weinberger v. Wiesenfeld, ____U.S.____, 43 L.Ed. 2d 514, 527 (1975); Stanley v. Illinois, 405 U.S. 645, 651 (1972). Second, the State's involvement in every divorce action is every bit as substantial as if it were directly a party in the proceedings. Through its courts, the State monopolizes the means for legally dissolving an untenable

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13 cont'd-- the procedural, as opposed to substantive, aspects of state matrimonial proceedings. Compare Boddie v. Connecticut, supra, and the instant case, with Sosna v. Iowa, 419 U.S. 393 (1975), and Mendez v. Heller, 530 F.2d 457 (2 Cir., 1976). See also Alsager v. District Court of Polk Cty., Iowa, 518 F.2d 1160 (8 Cir., 1975).

marriage and thereby for removing the prohibition against remarriage. Boddie, supra, Ortwein, supra. In this fashion, the State exercises exclusive governmental control over the dissolution of the constitutionally fundamental marriage relationship and involves itself substantially in determination of whether a parent will continue to enjoy her/his constitutionally protected interest in association with and care of her/his child.[14] The direct control which the State maintains over dissolution of the marriage relationship and over fundamental collateral issues is exercised in myriad ways through the legislation of the grounds and / procedures for obtaining a divorce. With respect to assignment of counsel the State has enacted a statute which provides that a state judge "may assign an attorney" to a divorce litigant (CPLR §1102(a)), but which, as authoritatively construed by the highest court of the State, (Matter of Smiley, 36 N.Y. 2d 433, 438, 444 n.2 (1975)), authorizes and sanctions the denial of assigned counsel to an indigent divorce litigant who needs but is unable to secure a lawyer. Cotton opinion, p.10 (A-39).

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[14] The State's direct involvement through its courts in impairing the parent's constitutionally fundamental interest in the care and companionship of her/his child is not diminished merely because it effectively delegates to the spouse direct authority to proceed against the parent. Cf. Planned Parenthood of Central Missouri v. Danforth, 44 U.S.L.W. 5197, 5292, 5203-4 (1976).

Thus the constitutional principle underlying Boddie v. Connecticut, that the indigent divorce litigant has a right to a fully meaningful hearing in divorce court, controls this case[15] and requires under the Due Process and Equal Protection Clauses of the Fourteenth Amendment that the State guarantee the assignment of counsel to every indigent divorce litigant who is unable to secure a lawyer yet needs the assistance of counsel in order to assure her/him a meaningful opportunity to be heard on her/his claimed right to obtain or avoid dissolution of the marriage relationship and on the collateral issues of custody or visitation of a child, child support, alimony, and an order of protec-

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[15] As Judge Jones concluded in his able dissenting opinion in the New York Court of Appeals in Matter of Smiley, 36 N.Y.2d 433 (1975), there is nothing in Boddie "to warrant any conclusion that it is only certain barriers that are to be eliminated," and Boddie can only be read as "confirming the right of individuals to the availability of judicial procedures for the dissolution of a marriage and as determining that such availability shall not be denied because of the circumstance of indigency." (36 N.Y.2d at 442-43). The conclusion of Judge Jones follows inevitably:

> To my mind it is both artificial and constitutionally impermissible to say that the State may not deny "access" (taking the narrow denotation of the word as "liberty to approach"), but, entrance having been permitted, the State may then deny effective presence and participation. At the very heart of our recognition of the right to counsel elsewhere has been our articulated conviction that "the right to be heard would be 'of little avail if it did not comprehend the right to be heard by counsel' [citations omitted]. 36 N.Y. 2d at 443-44.

The error of the Smiley majority lay in its failure to recognize that although the holding of Boddie was concerned only with filing fees and costs--because that was the sole issue before the

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tion.[16] It must be emphasized that the constitutional right is not an unlimited one. Plaintiffs do not claim a per se constitutional right to counsel for every indigent divorce litigant. Plaintiffs contend only that the Fourteenth Amendment secures the right to assigned counsel, on a case-by-case basis, to those indigent divorce litigants who are otherwise unable to obtain counsel and, as well, realistically need the assistance of counsel to meaningfully prosecute or defend the divorce actions. Thus, many divorce litigants clearly will not have a constitutional right to counsel, if they do not realistically need the assistance of counsel because of the relative simplicity of the issues involved

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15 (cont'd)-- Court-- the Boddie decision rested on the more fundamental principle of a divorce litigant's constitutional guarantee of a fully meaningful opportunity to be heard in the divorce proceeding.

16 The equal protection dimension of plaintiffs' constitutional rights to assigned counsel in their divorce proceedings gains additional support from the fact that the State of New York has legislatively guaranteed the right to assigned, compensated counsel to persons who litigate in Family Court many of the same issues respecting the family relationship as are at stake in a divorce action. By amendment to Part 6 of Article IV of the New York Family Court Act (Chapter 682 of the Laws of New York 1975, effective January 1, 1976), indigent adults are guaranteed the assistance in Family Court of assigned, compensated counsel in, inter alia, proceedings to approve an instrument purportedly surrendering parental custody of a child to a social services official (Social Services Law, §358-a), proceedings terminating parental guardianship of a child (Social Services Law, §384), proceedings to periodically review a child's foster care status (Social Services Law, §392), any proceedings involving child custody, and adoption proceedings involving parental opposition. The amendment also guarantees the assignment of compensated counsel on appeal from any of these proceedings. Yet when the same issues of child custody, visitation, and support are determined in divorce proceedings, CPLR §1102(a) permits the denial of the assignment of counsel to the indigent litigant. That distinction is plainly devoid of any rational basis.

and their own level of education and sophistication, or, even if indigent, they are able to obtain the free assistance of counsel from a legal services office or private attorney serving without compensation.[17]

The constitutional right to assigned counsel clearly obtains for the plaintiffs and plaintiff class in this action.[18] Plaintiffs and plaintiff class members herein are all divorce litigants who have established both their realistic need for the assistance of a lawyer and their inability to obtain either compensated or free counsel.[19] See this brief, at p. 4/ et seq., supra. The need for the assistance of counsel in order to insure fundamental fairness for the plaintiffs in their divorce proceedings[20] is amply described in the findings of Justice Cotton in Matter of Boyd:

> Unquestionably, the assistance of counsel is necessary for these prospective matrimonial litigants. In divorce actions, parties are almost invariably represented by counsel, and with good reason. The procedural steps necessary to prosecute a matrimonial action -- even an undefended one -- are numerous and complex; formal rules of evidence are in force at trial; litigants may lose important substantive and procedural rights if not timely and effectively raised; and proof requirements are more stringent than in other kinds of civil proceedings.*

See New York Domestic Relations Law §§144,211.

According to the affidavits of the 61 applicants, none has legal training or experience, and it is safe to conclude that not one of them is knowledgeable of the procedures necessary to follow in the prosecution of a divorce action. In any event none

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[17] Cf. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The constitutional right to assigned counsel is triggered only when these preliminary factual questions regarding the availability of and need for counsel are resolved in the divorce litigant's favor, as they were by Justice Cotton in the cases of the sixty-one applicants in Matter of Boyd.

[18] Of course, a governmental interest in saving money can no more justify the denial of the constitutional right to assigned counsel in divorce proceedings than it could sustain the validity of the fee and cost requirements in Boddie (401 U.S. at 382), or the denial of constitutional rights generally. See, e.g., Edelman v. Jordan, 415 U.S. 651, 667-68 (1974); Stanley v. Illinois, 405 U.S. 645, 656-58 (1972); Mayer v. Chicago, 404 U.S. 189, 197 (1971); Graham v. Richardson, 403 U.S. 365 (1971); Boddie v. State of Connecticut, 401 U.S. 371, 381-82 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. School Board, 377 U.S. 218 (1964); Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 399 (2 Cir., 1975); Rhem v. Malcolm, 507 F.2d 333, 340-41 (2 Cir., 1974).

[19] Plaintiffs' allegations are deemed to be true on review of the District Court's dismissal of this action. See this brief, at p. 5 n.3, supra.

[20] As Justice Powell stated in his concurring opinion in Argersinger v. Hamlin, 407 U.S. 25, 47 (1972), the due process tenet of "fundamental fairness" encompasses the right to assigned counsel "whenever the assistance of counsel is necessary to assure a fair trial."

would be able to handle those procedures pro se if called upon to do so. The preparation, serving and filing of the necessary papers alone is surely beyond their grasp -- those papers include the summons; complaint; reply to counterclaim (if any); demand for bill of particulars (if appropriate); pre-trial motions, as for temporary alimony or child support; note of issue; affidavit of regularity; certificate of dissolution; and findings of fact, conclusions of law and proposed judgment.

It is the opinion of this court that assistance of counsel is particularly important in matrimonial proceedings not only to protect the parties in any litigation but in any settlement negotiations regarding child custody and child support as well (cf. Matter of Ella B., 30 N.Y. 2d 352 [1972]). Such questions are likely to arise in a significant proportion of the cases at bar. Among the 61 applicants, only five have no minor children of the marriage. Twenty-three of the applicants have one child; 16 have two; 11 have three; one has four; two have five; one has six; and two have nine minor children born of the marriage. (These totals do not include children not of the marriage or children over 21, the age of majority for purposes of parental duty to support (D.R.L. Sec. 32)).

The court further notes that in eleven of the 61 cases at bar, a circumstance exists which makes the need for counsel even more compelling -- the applicant's inability to speak or read the English language. (Certificates of Spanish/English translation are annexed to the affidavits of Luz Vasquez, Awilda Cedeno, Carmen Fontanez, Maria Cardona, Antonia St. Hilare, Leslie Garcia, Maria-Teresa Nieves, Domitila Lopez, Noemi Torres, Enrique Savinovich and Geraldo Ramirez). For these prospective litigants, the prospect of attempting to proceed without counsel, to prepare and file papers in the English language, as required by CPLR 2102(b), is effectively foreclosed.

Cotton opinion, pages 4-6, A-33-5).

Justice Cotton further noted the "serious consequences" which inevitably ensue from the delay in the prosecution of divorce

actions due to the unavailability of counsel to assist prospective divorce plaintiffs.

> With the passage of time facts become more difficult of proof, witnesses become unavailable, and statutes of limitation run. (A five-year statute of limitations applies to causes of action for cruelty, imprisonment and adultery, asserted by 27 of these applicants (D.R.L. Sec. 210 [a]). Moreover, as long as these prospective litigants are without counsel, and consequently foreclosed from the exclusive remedy available to them, it will be difficult or impossible for them to settle and stabilize their fundamental family relationships, make fresh stats and seek new directions in their lives. The cost, in both personal and social terms, is substantial. Among the 39 women in this group of applicants who subsist on public welfare benefits, for example, there are perhaps some for whom a delay in the dissolution of an already dead marriage prevents them from entering into a remarriage that may offer an opportunity to break out of the cycle of welfare dependency.
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> (Cotton opinion, pp. 9-10, A-38-9).

See also dissenting opinion of Judge Fuchsberg in Matter of Smiley, 36 N.Y.2d 433, 450-52 (1975).[21]

Accordingly, the plaintiffs and plaintiff class members herein have a constitutional right to the assignment of counsel in their divorce proceedings. That claim requires for its determination the convening of a three-judge court.

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21 By recent amendment to §660.4(3) of the Rules of the Supreme Court for Bronx and New York Counties, effective June 14, 1976, the Appellate Division, First Department, has authorized the granting of a judgment in uncontested divorce actions upon the filing of an affidavit setting forth facts establishing jurisdiction and a cause of action, in lieu of a hearing. This alternate procedure will further increase the divorce litigant's need for the assistance of counsel. Under this procedure the correct and proper preparation of the necessary papers becomes even more crucial, since there will often not be the opportunity for the legally untrained and inexperienced lay divorce litigant to explain her or his position in informal fashion at a hearing. In any event, this amended procedure is avail-

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Plaintiffs and plaintiff class members seek in part a permanent injunction restraining the operation, execution, and enforcement of New York CPLR §1102(a), as applied to plaintiffs and plaintiff class members, upon the ground of its unconsitutionality, by restraining the actions of the defendant state officers in enforcing, executing, or relying on said statutory provision to refuse assigned counsel to indigent divorce plaintiffs and defendants who need yet are unable to obtain counsel. Although by its terms CPLR §1102(a) states only that a New York state court "may assign an attorney" to any litigant who is permitted to proceed as a poor person, the New York Court of Appeals in Matter of Smiley, 36 N.Y.2d 433, 438, 444 n.2 (1975), has authoritatively construed that provision to permit the unconstitutional refusal by a State Supreme Court Justice to assign counsel to an indigent divorce litigant who needs but is unable to obtain a lawyer. Plaintiffs' claim that the challenged state statute thus authorizes unconstitutional action can only be decided by a three-judge court convened pursuant to 28 U.S.C. §§2281 and 2284.[22]

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21 able only in uncontested divorces and even there the judge in his discretion may order a hearing.

22 A three-judge court is required to decide this action since it seeks an injunction against a statute of statewide application and expressive of general legislative policy, although the specific constitutional challenge is to that general legislative policy as applied to these plaintiffs and plaintiff class members (Turner v. Fouche, 396 U.S. 346, 353 n.10 (1970); Astro Cinema Corp., Inc. v. Mackell, 422 F.2d 293, 298 (2 Cir., 1970); Boddie v. State of Connecticut, 286 F.Supp. 968, 971 (D. Conn., 1968), rev'd on other grounds, 401 U.S. 371 (1971), and as implemented locally in a single county by local officials.

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Astro Cinema Corp., Inc. v. Mackell, 422 F.2d 293, 297-98 (2 Cir., 1970).[23]

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[22] (cont'd)-- Board of Regents v. New Left Education Project, 404 U.S. 541, 544 n.2 (1972); Turner v. Fouche, 396 U.S. 346, 353 n.10; Flast v. Cohen, 392 U.S. 83, 89-90 (1968); Ortiz v. Colon, 475 F.2d 135 (1 Cir., 1973); Misurelli v. City of Racine, 346 F.Supp. 43, 45 n.2 (E.D. Wis., 1972); Giordana v. Amity Regional High School District #5, 313 F.Supp. 403, 407-8 (D. Conn., 1970); Law Students Civil Rights Research Coun., Inc. v. Wadmond, 299 F.Supp. 117, 127-28 (S.D.N.Y., 1969), aff'd. 401 U.S. 154 (1971); Atkins v. City of Charlotte, 296 F.Supp. 1068,1073 (W.D.N.C., 1969); Kelly v. Wyman, 294 F.Supp. 893, 908 (S.D. N.Y.,1968); aff'd. sub nom. Goldberg v. Kelly, 397 U.S. 254 (1970); Nelson v. Rogers, 389 F.Supp. 1148 (W.D.Va., 1975); Hyden v. Baker, 286 F.Supp. 475, 480-81 (M.D. Tenn., 1968); Gilmore v. James, 274 F.Supp 75, 84 (N.D. Tex., 1967), aff'd. 389 U.S. 572 (1968).

[23] See also Vail v. Quinlan, 387 F.Supp. 630 (S.D.N.Y., 1975), three-judge court , 406 F.Supp. 951 (S.D.N.Y., 1976)(three-judge court convened to determine, inter alia, claimed unconstitutionality of debtor contempt statute for failure to require appointment of counsel); Abbit v. Bernier, 387 F.Supp. 57 (D.Conn., 1974)(three-judge court determines, inter alia, claim of unconstitutionality of body execution statute for failure to require assignment of counsel); Sero v. Oswald, 351 F.Supp. 522, 529 n.10 (S.D.N.Y., 1972); Fuentes v. Faircloth, 317 F.Supp. 954 (S.D. Fla., 1970), rev'd on other grounds sub nom. Fuentes v. Shevin, 407 U.S. 67 (1972).

The constitutional claim must be heard and determined by a three-judge court unless it is "obviously without merit," or if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Goosby v. Osser, 409 U.S. 512, 518 (1973); Finnerty v. Cowen, 508 F.2d 979, 985 (2 Cir., 1974); Wells v. Malloy, 510 F.2d 74, 77 (2 Cir.,1975); Nieves v. Oswald, 477 F.2d 1109, 1112-13 (2 Cir., 1973); Vail v. Quinlan, 387 F.Supp. 630, 633-34 (S.D.N.Y., 1975), three-judge court 406 F.Supp. 951 (S.D.N.Y., 1976). As demonstrated above, plaintiffs' constitutional claims are clearly substantial.

POINT IV

THE PRIOR STATE COURT PROCEEDINGS IMPOSE NO RES JUDICATA BARRIER TO THE FEDERAL COURT'S ADJUDICATION OF PLAINTIFFS' CONSTITUTIONAL CLAIMS ASSERTED HEREIN PURSUANT TO 42 U.S.C. §1983.

The defendants contended below that the ten named plaintiffs herein who had been denied assignment of counsel by Justice Cotton in Bronx Supreme Court were barred by res judicata principles from litigating their federal constitutional claims in federal court pursuant to 42 U.S.C. §1983. That contention is plainly erroneous for several reasons.

First, it is clear that the prior order of Justice Cotton denying the assignment of counsel to these named plaintiffs cannot, under the firmly established law of this Circuit, impose a res judicata bar to this federal action because the two proceedings involve neither the same parties or their privies nor the same causes of action. Herendeen v. Champion Intern. Corp., 525 F.2d 130 (2 Cir., 1975). Matter of Boyd in Bronx Supreme Court was decided on ex parte motions which, because they were filed in advance of the commencement of any divorce actions, did not involve any adverse parties, and those motions sought only the discretionary assignment of counsel without interposing any constitutional claim of the right to counsel. In contrast, this federal action is brought under the Civil Rights Act against defendant state judges and the state Governor and asserts only the separate and distinct cause of action resting on the claimed constitutional right to assigned

counsel. Clearly, there is not the requisite measure of identity between the parties or the causes of action in these two suits which is essential to support the conclusion that the state court order is res judicata as to plaintiffs' constitutional claims in federal court. Herendeen, supra; cf. Tang v. Appellate Division of New York Supreme Court, First Dept., 487 F.2d 138, 142-44 (2 Cir., 1973).

Second, Justice Cotton expressly stated that the plaintiffs in Matter of Boyd did not assert before him and that he did not decide any constitutional claims respecting the right to counsel (Cotton opinion, p.10, A-39), and it is well-settled in this Circuit that such a prior state court suit can create no res judicata barrier to a subsequent §1983 action in federal court which asserts federal constitutional claims which were not raised, litigated, and decided in that prior state proceeding.[24] Newman v. Board of Education, 508 F.2d 277, 278 (2 Cir., 1975), cert. denied, ___U.S.___, 43 L.Ed. 2d 762 (1975); Lombard v. Board of Education, 502 F.2d 631, 635-37 (2 Cir., 1974), cert. denied, ___U.S.___, 43 L.Ed. 2d 656 (1975). See also Liquifin Aktiengessellschaft v. Brennan, 383 F.Supp. 978, 982-83, 983 n.23 (S.D.N.Y., 1974); Javits v.

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[24] Significantly, Mr. Justice Powell, in dictum in his dissenting opinion in Ellis v. Dyson, 421 U.S. 426,440 (1975), articulated the res judicata question in terms of whether "in a §1983 action, principles of res judicata bar relitigation in federal court of constitutional issues decided in state judicial proceedings to which the federal plaintiff was a party." (emphasis supplied).

Stevens, 382 F.Supp. 131, 136-7 (S.D.N.Y., 1974); Fitzgerald v. Cawley, 368 F.Supp. 677, 679 (S.D.N.Y., 1973).[25]

Finally, whatever the applicability generally of principles of res judicata to §1983 federal actions, they should in any event be given no preclusive effect in the unique circumstances of this case. The rationale of a res judicata bar is to prevent "career litigants" from obtaining "two bites at the apple," first in state court and then in federal court, on the same constitutional claim, and to afford the state courts an opportunity, once a state proceeding is begun, to authoritatively resolve the question of the constitutionality of the challenged state provision. Viewed in light of this rationale, it is clear that no purpose would be served by applying a res judicata bar to the plaintiffs' institution of this §1983 action. The plaintiffs did not urge their constitutional claims upon Justice Cotton in Matter of Boyd precisely because, as the Justice indicated (Cotton opinion, p.10, A-39), those claims are completely foreclosed by the authoritative ruling of the highest court of New York State against them,just last year, in Matter of Smiley, 36 N.Y.2d 433 (1975). Cf. Cleaver v. Wilcox, 499 F.2d

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25 Contrast, e.g., Tang v. Appellate Division of the New York Supreme Court, First Dept., 487 F.2d 138 (2 Cir., 1973), where res judicata effect was given to a prior state proceeding in which the federal plaintiffs' constitutional claims were earlier raised, litigated, and decided.

940, 943-44 (9 Cir., 1974); Nelson v. Rogers, 389 F.Supp. 1148, 1151 (W.D.Va., 1975); Bramlett v. Peterson, 307 F.Supp. 1311, 1321 (M.D. Fla., 1969). Far from seeking to relitigate in federal court constitutional claims which they were unable to prevail on in a prior state court proceeding, the plaintiffs herein instituted this suit because the federal court is the only forum which remains available to adjudicate their federal claims.[26] The consequences of compelling indigent divorce litigants who are denied assignment of counsel in State Supreme Court to pursue their federal constitutional claim in the state appellate courts would be unacceptably harsh. First, that route is precluded by the non-appealability of the orders which determine ex parte motions in Supreme Court for assignment of counsel.[27] Second, during the lengthy period when they are making the empty gesture of pursuing state appeals whose unsuccessful outcome is foreordained by Matter of Smiley, supra, the indigent divorce litigants will undoubtedly be forced to prosecute their divorce actions in order to escape from unworkable, unhappy marriages or to defend divorce actions which are pressed by their spouses, all without the assistance of counsel.

For all or any of these reasons, the doctrine of res judicata should not be applied to bar this §1983 federal suit.

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[26] Defendants' basic contention that nobody can ever have these constitutional claims determined in federal court should not be accepted by this Court. See James v. Board of Education of Central Dist. No. 1, 461 F.2d 566, 570-71 (2 Cir., 1972); Population Services International v. Wilson, 398 F.Supp. 321, 328 (S.D.N.Y., 1975) (three-judge court).

[27] See this brief, at p. 30 , supra.

POINT V

THE DEFENDANT STATE JUDGES ARE NOT IMMUNE FROM THIS SUIT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. §1983.

In the District Court the defendants, relying on Mendez v. Heller, 530 F.2d 457 (2 Cir., 1976), argued that the ten named plaintiffs who were denied assignment of counsel by Justice Cotton could not sue the defendant state judges in federal court pursuant to 42 U.S.C. §1983 for declaratory and injunctive relief. Defendants' reliance on Mendez was misplaced. That case held only that the defendant state Family Court judge and clerk sued there were not proper adversaries in a §1983 action challenging New York's two-year divorce residency requirement since the plaintiffs' divorce complaint had not been presented to and rejected by those defendants and the "reasonable likelihood" of such a rejection had not been shown. Mendez, 530 F.2d at 460. Mendez thus has no application to the instant case, where the named plaintiffs either have applied for and been denied assignment of counsel by a defendant state judge or have demonstrated the "reasonable likelihood" of denial of such applications and of any claim of a constitutional right to assigned counsel which they might have made.[28]

Dicta in Mendez might be read to suggest further that state judges are not suable for declaratory and injunctive relief pursuant

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28 See this brief at, at p.23 , supra. Note that had the issue been presented to him, Justice Heller would have been free to exercise independent judicial judgment in state court in passing on the constitutionality of the divorce residency requirement challenged in Mendez.

(cont'd next page

to 42 U.S.C. §1983 even where they directly deny a federal constitutional right.[29] However, as demonstrated below, the suggestion that state judges are immune from §1983 declaratory and injunctive relief cannot survive careful analysis.

Close scrutiny of the question compels the conclusion that state judges generally enjoy no immunity whatsoever from liability for declaratory and injunctive relief sought pursuant to 42 U.S.C. §1983. The several Supreme Court decisions which have considered the existence and extent of official immunity from §1983 liability "were not products of judicial fiat that officials in different branches of government are differently amenable to suit under §1983," but rather are "predicated upon a considered inquiry into the immunity historically accorded the relevant offical at common law and the interests behind it." Imbler v. Pachtman, ___U.S.___, 47 L.Ed. 2d 128, 138(1976) (holding a state prosecutor absolutely immune from §1983 liability for damages when acting within the scope of his duties in initiating and pursuing a criminal prosecution). An examination of the relevant Supreme Court decisions discloses that the Court engages in a three-step analytical process in determining the particular §1983 immunity

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(footnote cont'd from preceding page)
28 (cont'd)-- In contrast, Justice Cotton's decision as to the constitutionality of the denial of assignment of counsel to indigent divorce litigants, had he been asked to pass on that question, would have been completely controlled by the dispositive ruling of the New York Court of Appeals in Matter of Smiley, 36 N.Y.2d 433 (1975), and hence would have been wholly ministerial in nature.

29 Such dicta has, of course, no binding effect. United States v. Bell, 524 F.2d 202, 206 (2 Cir., 1975).

which can be claimed by any state official, including a state judge. First, the Court determines the extent, if any, of the particular immunity which was enjoyed by that state official at common law; that common law immunity marks the outer limits of the immunity which the official can be accorded under 42 U.S.C. §1983. Second, the Court determines from an examination of the relevant legislative history whether Congress intended to restrict the scope of the common law immunity of the state official in the context of §1983 actions. Third, if there is no discernible congressional intent to abrogate the common law immunity under §1983, the Court inquires whether the same considerations of public policy that underlie the common law immunity justify its continuation under §1983. See Imbler v. Pachtman, supra; Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity of school officials from §1983 liability for damages); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity of Governor and other state executive officials from §1983 liability for damages); Pierson v. Ray, 386 U.S. 547 (1967)(absolute immunity of state judges and qualified immunity of local police officers from §1983 liability for damages); Tenney v. Brandhove, 341 U.S. 367 (1951)(absolute immunity of state legislators from §1983 liability for damages).

Upon analysis, it is clear that state judges enjoy no immunity from purely equitable declaratory and injunctive relief under 42 U.S.C. §1983, since state judges had no immunity whatever at common law from compulsory civil process.[30]

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30 The absence of common-law immunity for state judges from compulsory (cont'd next page)

A. Absence of Common-Law Immunity

At common law the judicial power of the courts was derived from the King of England, and the King's judges therefore enjoyed the immunity of the sovereign from civil damage claims. Conover v. Montemuro, 477 F.2d 1073, 1101 (3 Cir., 1973) (Gibbons, J., concurring). However, the judges at common law had no immunity from compulsory civil process issued by the Chancellor exercising the King's prerogative. Conover, supra, 477 F.2d at 1102. This authority over the English courts was exercised in the ancient writs of mandamus and prohibition, "as a convenient mode of exercising a wholesome control over inferior tribunals." Appo v. The People, 20 N.Y. 531, 542 (1860). Writs of prohibition and mandamus were generally issued "to restrain subordinate courts and inferior judicial tribunals of every kind from exceeding their jurisdiction," Id. at 540, and also to restrain a "tribunal [which] has

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30 (cont'd)-- civil process makes it unnecessary to inquire whether Congress intended by passage of 42 U.S.C. §1983 to override any existent common-law immunity from liability for equitable relief or whether policy considerations justify the preservation of any common-law immunity under §1983. However, it is clear that Congress meant to authorize the federal courts to issue equitable relief pursuant to §1983 against all state officials, whether executive, legislative, or judicial, to redress the violation of constitutional rights. Mitchum v. Foster, 407 U.S.225, 240-42 (1972); Littleton v. Berbling, 468 F.2d 389, 395-415 (7 Cir.,1972), rev'd on other grds. sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974). Also, present here are none ofthe policy considerations which persuaded the Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967) to give full effect under §1983 to a state judge's absolute immunity at common law from liability for damages. Equitable relief against the purely unconstitutional acts of state judges does not interfere with the judge's discretionary decision-making since a state judge has no discretion to engage in clearly unconstitutional activity such as denying assigned counsel to indigent defendants in divorce proceedings.

jurisdiction, [and] goes beyond its legitimate powers," Id at 541.

The New York State Supreme Court is the court of general jurisdiction in law and equity and as such it has:

> all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time, and by the court of chancery in England on the fourth day of July seventeen hundred seventy-six, with the exceptions, additions and limitations created and imposed by the constitution and laws of the state. Subject to those exceptions and limitations the supreme court of the state has all the powers and authority of each of those courts and may exercise them in like manner.
>
> New York Judiciary Law §140-b (McKinney's, 1968)[31]

In addition, Article I, §14 of the New State Constitution of 1939[32] provides as follows:

> Such parts of the common law, and of the acts of the legislature of the colony of New York as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.

Thus the courts of original jurisdiction of the State of New York have all the powers of the common law courts of the King's Bench and Chancery, as they existed when the first New York State Constitution of 1777 was adopted, as they may have been modified by constitution or

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31 Judiciary Law §140-b was derived virtually unchanged from former Civil Practice Act §64, which was in turn derived from former Code of Civil Procedure §217.

(see next page for other footnote)

statute. Matter of Steinway, 159 N.Y. 250, 258 (1899). That the powers thus possessed by New York courts includes the power to issue writs of prohibition and mandamus to restrain an inferior court from the unauthorized exercise of jurisdiction or from exceeding its authorized powers is beyond cavil. Hogan v. Court of General Sessions, 296 N.Y. 1 (1946); Appo v. The People, 20 N.Y. 531 (1860); Jerome v. Court of General Sessions, 185 N.Y. 504 (1906). People ex rel Safford v. Surrogates Court, 229 N.Y. 495 (1920); People ex rel Lemon v. Supreme Court, 245 N.Y. 24 (1927); Lee v. County Ct. of Erie County, 27 N.Y.2d 432 (1971). Moreover, although New York law has codified the common law writs under Civil Practice Law and Rules Article 78, the New York Court of Appeals has held that this codification is merely a change in form and that the writ of prohibition continues to be governed by "common law as to its nature, function and the facts governing its issuance." Hogan v. Court of General Sessions, 296 N.Y. 1, 8 (1946).

The power inherent in the Court of Chancery at common law to compel inferior tribunals to answer compulsory civil process is part of the judicial power of the United States federal courts, just as it is part of the power of the New York State courts. The transference of common law equity powers to the federal courts is carefully and expertly traced

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32 Article I, §14 is derived from the original State Constitution of 1777, Article 35. See Matter of Steinway, 159 N.Y. 250, 257 (1899).

by Circuit Judge Gibbons in his concurring opinion in Conover v. Montemuro, 477 F.2d 1073, 1094-1103 (3 Cir., 1973). Judge Gibbons' analysis compels his conclusion that the King's prerogative at common law, formerly exercised by the Chancery Court, to issue compulsory civil process to judges is part of the judicial power of the United States federal courts by virtue of Article III of the Constitution, and that that power includes the power to issue compulsory civil process to state judges for constitutional violations.

Since state judges were subject to compulsory civil process at common law they clearly are suable under 42 U.S.C. §1983 and are not immune from §1983 declaratory and injunctive relief.

B. Applicable Decisional Law

The suability of state judges for declaratory and injunctive relief in federal court is clearly indicated by repeated decisions of the Supreme Court and the lower federal courts.

In Ex parte Young, 209 U.S. 123 (1908), the Court held generally that state officials can be enjoined by federal courts from committing unconstitutional acts. In so concluding, the Court observed that in violating the United States Constitution the state official acts beyond his authority and is stripped of his official character since the "State has no power to impart to him any immunity from responsibility to the supreme authority of the United States [Constitution]." 209 U.S. at 159-60, 167. In enjoining the state official's unconstitutional behavior, the federal court is not controlling that official's exercise of discretion

but rather only directing him to perform his "merely ministerial duty" of obeying the Constitution, which he has no authority to violate. 209 U.S. at 158-59. Also Sterling v. Constantin, 287 U.S. 378, 393 (1932) ("The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief"). Even earlier, the Court had held in Ex parte Virginia, 100 U.S. 339 (1879), that all state officials, whether exercising legislative, executive, or judicial functions, are bound by the Constitution, and, specifically, that state judges can be held accountable in federal court for constitutional violations arising from their judicial, as well as from their administrative, acts. 100 U.S. at 346-6, 348. In so ruling, the Court observed that an unconstitutional act is not within the judicial discretion of a state judge, and, hence, interference with that act by a federal court does not interfere with "judicial action." (100 U.S. at 349-49). See also Ex parte Bradley, 74 U.S. (7 Wall.) 364, 19 L.Ed. 214 (1868).

In Bush v. Orleans Parish School Board, 365 U.S. 569 (1961), the Supreme Court, in a §1983 action, summarily affirmed the judgment of the three-judge District Court, 187 F.Supp. 42, 46 (E.D.La., 1960), which, inter alia, enjoined a state judge from issuing, in violation of the Fourteenth Amendment, an injunction to prevent the local school board from desegregating its public schools. The Supreme Court's affirmance necessarily affirmed the grant of the injunction against the

state judge for his unconstitutional action. See also Cooper v. Aaron, 358 U.S. 1, 16-18 (1958); In re Herndon, 394 U.S. 399 (1969) (per curiam); Deen v. Hickman, 358 U.S. 57 (1958) (per curiam); United States v. Caldwell, 2 U.S. (2 Dall.) 333, 1 L.Ed. 404, 25 Fed. Cas. 238 (1795). Cf. Mitchum v. Foster, 407 U.S. 225, 227 (1972) (vacating the lower court's judgment whichhad rested on the conclusion that it had no power to issue an injunction directed to a state court judge enjoining further proceedings in and under a state court suit.)

Finally, it is clear that in O'Shea v. Littleton, 414 U.S. 488 (1974), rev'g 468 F.2d 389 (7 Cir., 1972), the Supreme Court necessarily held, sub silentio, that state judges are proper adversaries in §1983 action and are not immune from §1983 declaratory and injunctive relief. Without addressing itself directly to the ruling of the Court of Appeals that the defendant state judges were not immune from §1983 equitable relief for their allegedly racially discriminatory practices (468 F.2d at 395-415), the Supreme Court reversed the decision below in part because the sweeping injunctive relief sought by the plaintiffs represented an unwarranted federal court intrusion into state processes (414 U.S. at 499-504). The majority reached that conclusion only after carefully and extensively evaluating the nature and scope of the specific injunctive relief requested, and in so doing necessarily reached and resolved favorably the question of whether state judges are suable at all in §1983 actions and whether equitable relief of any kind can be granted against them. If no justiciable controversy could be stated against state judges and if they were absolutely immune from the issuance of §1983

declaratory and injunctive relief, then there would have been no occasion whatever for the Court to reach the ground of the inappropriate sweep of the injunctive relief sought by the plaintiffs against the state judges.

The O'Shea decision leaves no doubt that the Supreme Court has implicitly and necessarily held that state judges are suable under 42 U.S.C. §1983 and are not immune from §1983 declaratory and injunctive relief. Cf. Mitchum v. Foster, 407 U.S. 225, 231 (1972), where the Court observed that its prior decisions in Younger v. Harris, 401 U.S. 37 (1971), and its companion cases necessarily decided that §1983 comes within the "expressly authorized" exception of the anti-injunction statute, since had the case been otherwise the comity and federalism grounds upon which Younger was rested would have been wholly superfluous.[33]

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[33] The overwhelming majority of lower federal courts, and all the well-reasoned decisions, agree that state judges are not immune from §1983 liability for purely declaratory and injunctive relief tailored to preventing unconstitutional activity. Hansen v. Ahlgrimm, 520 F.2d 768, 769 (7 Cir., 1975); Boyd v. Adams, 513 F.2d 83, 86-7 (7 Cir., 1975); Cleaver v. Wilcox, 499 F.2d 940 (9 Cir., 1974) (right to counsel); Conover v. Montemuro, 477 F.2d 1073, 1082-1083, 1094-1104 (3 Cir., 1973); Littleton v. Berbling, 468 F.2d 389, 395-415 (7 Cir., 1972) rev'd on other grds. sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974), Erdmann v. Stevens, 458 F.2d 1205, 1208 (2 Cir., 1972), cert. denied, 409 U.S. 889 (1972); Jacobson v. Schaefer, 441 F.2d 127, 130 (7 Cir., 1971); United States v. McLeod, 385 F.2d 734, 738 n.3 (5 Cir., 1967); Beard v. Stephens, 372 F.2d 685, 690 n.8 (5 Cir., 1967); Vail v. Quinlan, 406F.Supp. 951 (S.D.N.Y., 74 Civ. 4773, January 6, 1976) (three-judge court); Doe v. County of Lake, Indiana, 399 F.Supp. 553 (N.D. Ind., 1975); Nelson v. Rogers, 389 F.Supp. 1148, 1150 (W.D.Va., 1975); Javits v. Stevens, 382 F.Supp. 131, 136 (S.D. N.Y., 1974); Anderson v. Dean, 354 F.Supp. 639 (N.D. Ga., 1973); Martarella v. Kelley, 349 F.Supp. 575, 593-4 (S.D.N.Y., 1972); Callahan v. Sanders, 339 F.Supp. 814 (M.D. Ala., 1971)(right to counsel); Haley v. Troy, 338

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Thus, the defendant state judges are properly suable here for the declaratory and injunctive relief sought by plaintiffs pursuant to 42 U.S.C. §1983.

(footnote cont'd from preceding page)

[33] (cont'd)-- F.Supp. 794, 800 (D. Mass., 1972); Nicholson v. Board of Com'rs of Alabama State Bar Ass'n., 338 F.Supp. 48, 52 n.4 (M.D. Ala., 1972)(three-judge court); Cassidy v. Ceci, 320 F.Supp. 223, 228 (E.D. Wis., 1970); Rakes v. Coleman, 318 F.Supp. 181 (E.D. Va., 1970); Bramlett v. Peterson, 307 F.Supp. 1311 (M.D. Fla., 1969)(right to counsel); Koen v. Long, 302 F.Supp. 1383, 1389 (E.D. Mo., 1969), aff'd per curiam 428 F.2d 876 (8 Cir., 1970), cert. denied, 401 U.S. 923 (1971); Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 123 (S.D.N.Y., 1969), aff'd on other grds., 401 U.S. 154, 158 n.9 (1971); Phillips v. Cole, 298 F.Supp. 1049 (N.D. Miss., 1968)(right to counsel); Rousselle v. Perez, 293 F.Supp. 298, 299 (E.D. La., 1968); Bennett v. Cottingham, 290 F.Supp. 759 (N.D. Ala., 1968) aff'd 393 U.S. 317 (1969) (right to counsel) Stambler v. Dillon, 288 F.Supp. 646, 649 (S.D.N.Y., 1968); Hulett v. Julian, 250 F.Supp. 208 (M.D. Ala, 1966)(three-judge court)(right to counsel); United States v. Clark, 249 F.Supp. 720, 727-8 (S.D. Ala., 1965)(three-judge court).

POINT VI

THIS ACTION SHOULD BE CERTIFIED AS A CLASS ACTION.

This class action is properly maintained pursuant to Rule 23(a) and Rule 23 (b)(2) or Rule 23(b)(1)(A) or (B) on behalf of all indigent Bronx County divorce litigants, both plaintiffs and defendants, who need but are unable to obtain the assistance of counsel in their divorce actions. Clearly, the class is so numerous that joinder of all members is impracticable. Rule 23(a)(1). Submitted in support of the motion of the thirteen named plaintiffs in the District Court for certification of this action as a class action were the affidavits of thirty-five members of plaintiffs' class, who were among the sixty-one indigent prospective divorce litigants whose applications for assignment of counsel were denied by Bronx State Supreme Court Justice Cotton. In his affidavit in support of plaintiffs' motion, Michael Hampden, the Attorney-in-Charge of the Bronx Office of The Legal Aid Society, estimate, based on his personal knowledge and experience, that there are at any one time many hundreds of indigent Bronx divorce litigants who need but are unable to obtain the assistance of counsel. (A-42). A similar conclusion was reached by Justice Cotton in his decision denying the applications of the indigent divorce litigants who sought assignment of counsel from him. (A-30). Absent class certification these many members of plaintiffs' class will have no choice but to intervene in this action on remand or to institute separate federal

actions raising the same claims and seeking identical relief. The class action numerosity requirement is plainly satisfied here. Cf. United States ex.rel. Sero v. Preiser, 506 F.2d 1115, 1126-27 (2 Cir., 1974)(numerosity requirement satisfied by classes of 18 and 40); Jones v. Diamond, 519 F.2d 1090, 1099-1100 n.18 (5 Cir., 1975)(class of 20); King v. Carey, 405 F.Supp. 41, 44 (W.D.N.Y., 1975)(class of 80); United States ex rel. Walker v. Marcusi, 338 F.Supp. 311, 315-16 (W.D.N.Y., 1971), aff'd. 467 F.2d 51 (2 Cir., 1972)(class of 38).

The "questions of law or fact common to the class" (Rule 23(a)(2)) are whether indigent divorce plaintiffs and defendants who need yet are unable to obtain the assistance of counsel have a federal constitutional right to the assignment of counsel and whether CPLR §1102(a) is unconstitutional in failing to require such assignment of counsel in those circumstances.

The claims of the representative parties are typical of the claims of the class members, since they all assert that they need but are unable to obtain counsel to represent them in divorce proceedings, that they have a federal constitutional right to assignment of counsel, and that CPLR §1102(a) is unconstitutional for failure to guarantee that constitutional right. In supporting their own claims the representative parties will simultaneously advance the claims of the other members of the class. Rule 23(a)(3) and (4). Penn v. San Juan Hospital, Inc., 528 F.2d 1181 (10Cir,1975); Rosado v. Wyman, 322 F.Supp. 1173, 1193 (S.D. N.Y., 1970). Counsel for plaintiffs, The Legal Aid Society, has legal resources and experience adequate to protect all members of the class

and undertakes to vigorously advance the interests of all members of the class throughout this litigation. Rule 23(a)(4). Sosna v. Iowa, 419 U.S. 393, 403 (1975). See, e.g., Parisi v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y., 1974), and 393 F.Supp. 715 (E.D.N.Y., 1975); Lugo v. Dumpson, 390 F.Supp. 379 (S.D.N.Y., 1975)..

The prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the defendants in this action. Separate actions would also create a risk of adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Rule 23(b)(1)(A) and (B). Anderson v. City of Belle Glade, 337 F.Supp. 1353 (S.D.Fla., 1971); Denny v. Health and Social Services Bd. of Wisc., 285 F.Supp. 526 (E.D. Wisc., 1968).

In refusing to assign counsel to indigent divorce litigants because of the unavailability of attorneys to assign in relation to the number of applicants, and because CPLR §1102(a) does not guarantee the right to assignment, defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole. Rule 23(b)(2). Cleaver v. Wilcox, 499 F.2d 940, 943 (9 Cir., 1974); Gilliard v. Carson, 348 F.Supp. 757 (M.D. Fla., 1972); Bramlett v. Peterson, 307 F.Supp. 1311 (M.D. Fla., 1969); Philips v.

Cole, 298 F.Supp. 1049 (N.D. Miss., 1968)(class actions to vindicate denial of constitutional right to assigned counsel); cf. Griffin v. Richardson, 346 F.Supp. 1226, 1230-31 (D. Md., 1972), aff'd. 409 U.S. 1069 (1972).

In failing to certify this properly maintained class action, Judge Duffy violated the plain requirement of Rule 23(c)(1) of the Federal Rules of Civil Procedure that the District Court must determine the issue of class action certification "[a]s soon as practicable after the commencement of an action brought as a class action," and prior to and without regard to its decision on the merits. Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10 Cir., 1975); Jiminez v. Weinberger, 523 F.2d 689, 697 (7 Cir., 1975), cert. den. sub nom. Mathews v. Jiminez, 44 U.S.L.W. 3754 (1976). This Court should direct the District Court on remand to certify this action as a class action.[34] Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9 Cir., 1975); Jiminez v. Weinberger, supra. See this brief, at p. 26, supra. See generally, Nieves v. Oswald, 477 F.2d 1109, 1111 n.4 (2 Cir., 1973); Escalera v. New York City Housing Authority, 425 F.2d 853 (2 Cir., 1970); Holmes v. New York City Housing Authority, 398 F.2d 262 (2 Cir., 1968); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2 Cir., 1960);

[34] Even where a three-judge court is eventually convened, the better practice, especially in a case like the present one (see pp. 26-8, supra), is for the single District Judge to certify the class. Fioto v. U.S. Dept. of Army, 409 F.Supp. 831, 832 n.1 (E.D.N.Y., 1976); Vail v. Quinlan, 406 F.Supp. 951 (S.D.N.Y., 1976); Johnson v. Rockefeller, 58 F.R.D. 42 (S.D.N.Y., 1973).

Rodriguez v. Percell, 391 F.Supp. 38, 41 n.2 (S.D.N.Y., 1975); Hurley v. Van Lare, 365 F.Supp. 186, 189-91 (S.D.N.Y., 1973); Washington v. Lee, 263 F.Supp. 327 (N.D. Ala., 1966), aff'd. per curiam, 390 U.S. 333 (1968). Cf. U.S. ex rel. Sero v. Preiser, 506 F.2d 1115 (2 Cir., 1974).

CONCLUSION

For the reasons stated above, this Court should reverse the order of the District Court dismissing the plaintiffs' action, and should remand this case to the District Court with directions as to its proper further disposition.

Dated: New York, New York
July 30, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

BARBARA BOYD, et al, : C.A. Docket No. 76-7234

Plaintiffs-Appellants,

:

-against-

THE JUSTICES OF SPECIAL TERM, et al:

Defendants-Appellees.

----------X

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SUSAN STERNBERG, being duly sworn, deposes and says:

1. Deponent is not a party to this action, is over 18 years of age, and resides in Flushing, Queens.

2. On July 30, 1976, deponent served the plaintiffs-appellants' brief and joint appendix on this appeal upon Attorney General Louis J. Lefkowitz, attorney for the defendants-appellees, at Two World Trade Center, New York, N.Y. 10047, by depositing 2 true copies of the brief and 1 true copy of the appendix in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Susan Sternberg
SUSAN STERNBERG

Sworn to before me this
30th day of July, 1976.

John E. Kirklin

JOHN E. KIRKLIN
Notary Public, State of New York
No. 24-4610057
Qualified in Kings County
Term Expires March 30, 1977